



HOUSE OF LORDS

Select Committee on the Constitution

8th Report of Session 2019–21

Agriculture Bill

Ordered to be printed 18 June 2020 and published 23 June 2020

Published by the Authority of the House of Lords

Select Committee on the Constitution

The Constitution Committee is appointed by the House of Lords in each session “to examine the constitutional implications of public bills coming before the House; and to keep under review the operation of the constitution and constitutional aspects of devolution.”

Membership

The Members of the Constitution Committee are:

[Lord Beith](#)

[Baroness Corston](#)

[Baroness Drake](#)

[Lord Dunlop](#)

[Lord Faulks](#)

[Baroness Fookes](#)

[Lord Hennessy of Nympsfield](#)

[Lord Howarth of Newport](#)

[Lord Howell of Guildford](#)

[Lord Pannick](#)

[Lord Sherbourne of Didsbury](#)

[Baroness Taylor of Bolton](#) (Chair)

[Lord Wallace of Tankerness](#)

Declaration of interests

A full list of Members’ interests can be found in the Register of Lords’ Interests:

<http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests>

Publications

All publications of the Committee are available at:

<http://www.parliament.uk/hlconstitution>

Parliament Live

Live coverage of debates and public sessions of the Committee’s meetings are available at:

<http://www.parliamentlive.tv>

Further information

Further information about the House of Lords and its committees, including guidance to witnesses, details of current inquiries and forthcoming meetings is available at:

<http://www.parliament.uk/business/lords>

Committee staff

The current staff of the committee are Matt Korris (Clerk) and Dan Weedon (Committee Assistant). Professor Stephen Tierney and Professor Jeff King are the legal advisers to the Committee.

Contact details

All correspondence should be addressed to the Constitution Committee, Committee Office, House of Lords, London SW1A 0PW. Telephone 020 7219 5960. Email constitution@parliament.uk

Agriculture Bill

Introduction

1. The Agriculture Bill was introduced to the House of Commons on 16 January 2020. It was brought to the House of Lords on 18 May and received a second reading on 10 June. Committee stage is scheduled for 7 July. A previous iteration of the Bill was considered but not passed during the 2017–19 session.
2. The Bill addresses a range of matters arising from the United Kingdom's forthcoming departure from the European Union, in particular the UK's withdrawal from the EU's Common Agricultural Policy (CAP) and its replacement with new arrangements. In this report we highlight the constitutional implications of the Bill as regards devolution and delegated powers.

Devolution

Legislative competence

3. The UK entered the European Union before devolution to Scotland, Wales and Northern Ireland. Powers that were given to the EU during the UK's membership are now returning to a fundamentally different governance structure.
4. Agriculture is a devolved matter. Although the allocation of agricultural budgets between the devolved administrations has always been reserved to the UK Government, implementation of the CAP was devolved, as was the management of direct payments to farmers. Therefore, separate legislation by each of the devolved legislatures on agricultural financial assistance is anticipated.
5. The Bill applies primarily to England, although certain provisions apply to the whole of the UK, such as those concerning the World Trade Organisation (WTO) Agreement on Agriculture.¹ The UK Government has sought the consent of the three devolved legislatures in respect of several provisions in the Bill which, in its view, affect devolved matters.²
6. Schedules 5 and 6 substantially replicate parts of the Bill for Wales and (to a lesser extent) Northern Ireland. Schedule 5 was included in the Bill at the request of the Welsh Government as a temporary measure until the Welsh Parliament³ passes its own agriculture legislation. The Welsh Government intends to publish a white paper later in the year ahead of an Agriculture (Wales) Bill being introduced to the Welsh Parliament.⁴
7. Different considerations apply in relation to Northern Ireland given the suspension of devolved governance arrangements when the Bill was drafted. Despite the restoration of the institutions in January 2020, the Bill makes provision for Northern Ireland. The Government states that schedule 6 "is to

1 Agriculture Bill [HL Bill 112 (2019–21)], [clauses 40–42](#)

2 Agriculture Bill, [Explanatory Notes](#), paras 20–22

3 The National Assembly for Wales became the Welsh Parliament / Senedd Cymru on 6 May 2020.

4 Welsh Government, *Written Statement: UK Agriculture Bill*, 16 January 2020: <https://gov.wales/written-statement-uk-agriculture-bill> [accessed 15 June 2020]

enable [the Northern Ireland Department of Agriculture, Environment and Rural Affairs] to continue to make payments to farmers and land managers after the UK leaves the EU and to ensure that Executive Ministers have the flexibility to develop policy in Northern Ireland.”⁵

8. The Welsh Government “is generally supportive of the Bill as drafted” and negotiations between the Welsh and UK governments are ongoing to address outstanding concerns.⁶ A legislative consent motion has been approved by the Northern Ireland Assembly.⁷
9. The Scottish Government did not want the Bill to extend to Scotland in a similar fashion to the schedules for Wales and Northern Ireland. A separate bill, the Agriculture (Retained EU Law and Data) (Scotland) Bill, has been introduced in the Scottish Parliament.⁸ However, the Scottish Government argues that devolved consent is required for certain provisions of the Agriculture Bill that affect Scotland.⁹ The Scottish Government has proposed a number of amendments to the Bill in these areas “designed to reflect devolved competences and bring the clauses into line with the devolution settlement.”¹⁰ The UK Government maintains that the Bill does not engage devolved competence in these areas and that legislative consent is not required for them.
10. The Scottish Government’s recommendation to the Scottish Parliament is that it should consent to certain provisions in the Bill, but withhold consent to others unless amendments are made.¹¹ This is in contrast to the previous iteration of the Agriculture Bill in 2017–19, to which the Scottish Government recommended refusing consent altogether.¹²
11. Although the UK and Scottish governments each maintain that the position is clear—legislative consent is either clearly needed or clearly not needed for a number of provisions—the reality, in respect of certain provisions, may be less clear.
12. For example, clauses 27–30 authorise the Secretary of State to make regulations in relation to fair dealing in respect of agricultural products, the legal recognition of producer organisations and their obligations under competition law. These clauses appear to fall within paragraph C3 of schedule 5 to the Scotland Act 1998, which reserves to Westminster competence for the “regulation of anti-competitive practices and agreements; abuse of dominant

5 Explanatory Notes, para 359

6 Welsh Government, *Legislative Consent Memorandum: Agriculture Bill*, February 2020, paras 87–88: <https://senedd.wales/laid%20documents/lcm-ld13036/lcm-ld13036%20-e.pdf> [accessed 15 June 2020]

7 Northern Ireland Department of Agriculture, Environment and Rural Affairs, *Legislative Consent Memorandum: Agriculture Bill*, 21 February 2020: <http://www.niassembly.gov.uk/globalassets/committee-blocks/agriculture-environment-and-rural-affairs/2017---2022/agriculture-bill-legislative-consent-memorandum---as-laid-2-march-2020.pdf> [accessed 15 June 2020]; Northern Ireland Assembly, Official Report: Tuesday 31 March 2020: <http://aims.niassembly.gov.uk/officialreport/report.aspx?eveDate=2020/03/31&docID=299867> [accessed 15 June 2020]

8 Scottish Parliament, *Agriculture (Retained EU Law and Data) (Scotland) Bill*: <https://beta.parliament.scot/bills/agriculture-retained-eu-law-and-data-scotland-bill> [accessed 15 June 2020]

9 Scottish Government, *Legislative Consent Memorandum: Agriculture Bill*, 4 May 2020, paras 12–15: https://www.parliament.scot/S5_Bills/SPLCM-S05-38.pdf [accessed 15 June 2020]

10 Scottish Government, *Proposed Amendments to the UK Agriculture Bill*, 20 February 2020: <https://www.gov.scot/publications/proposed-amendments-to-the-uk-agriculture-bill/> [accessed 15 June 2020]

11 Scottish Government, *Legislative Consent Memorandum: Agriculture Bill*, 4 May 2020, paras 37–38

12 Scottish Government, *Legislative Consent Memorandum: Agriculture Bill*, 29 October 2018: <https://www.parliament.scot/S5ChamberOffice/SPLCM-S05-19.pdf> [accessed 15 June 2020]

position; monopolies and mergers.” But the boundaries of this reservation have never been tested before the courts and remain uncertain.

13. In relation to the WTO clauses in the Bill, there is reasonable scope for disagreement. On the one hand, “international relations”, including the “regulation of international trade”, is a reserved matter.¹³ At the same time, “observing and implementing international obligations” is not reserved¹⁴ and agriculture is devolved. Clause 40 of the Bill authorises the Secretary of State to “make regulations for the purpose of securing compliance by the United Kingdom with the Agreement on Agriculture”. This includes power to set limits on domestic support for the industry across different countries of the UK.
14. The question arises as to whether these powers engage only reserved matters—because the regulation of international trade and competition policy are reserved—or whether they encroach on devolved matters, given that the implementation of international obligations is devolved and relates, like clauses 27–30, to devolved agricultural purposes.
15. **These points illustrate the sort of competence disputes that are increasingly likely to arise—especially in relation to future international trade agreements—as the repatriation of powers from the EU gives rise to new areas in which UK and devolved competences are liable to intersect.**
16. We reiterate the conclusions in our report, *Parliamentary Scrutiny of Treaties*:

“As part of its treaty-making after the UK leaves the European Union, the UK Government must engage effectively with the devolved institutions on treaties that involve areas of devolved competence.

The UK Government will need to consult the devolved governments about their interests when opening negotiations, not just to respect the competences of those governments but also in acknowledgement of the important role devolved administrations may play in the implementation of new international obligations.”¹⁵
17. Ultimately the UK Government can direct action to be taken or not taken where any action proposed by the Scottish Government would be incompatible with international obligations.¹⁶ This is a final backstop to ensure that the Scottish Government complies with the UK’s international legal duties; equivalent provisions exist in respect of Wales and Northern Ireland. Were the UK Parliament to do so it would indicate that inter-governmental relations had reached a low ebb. The UK Parliament also retains power to legislate for Scotland under section 28 of the Scotland Act 1998.

13 Scotland Act 1998, [schedule 5, para 7\(1\)](#)

14 *Ibid.*, schedule 5, para 7(2)

15 Constitution Committee, *Parliamentary Scrutiny of Treaties* (20th Report, Session 2017–19, HL Paper 345), paras 140–141

16 Scotland Act 1998, [section 58](#)

Common frameworks

18. Agricultural financial assistance is one of the main areas for which new common arrangements across the UK are essential. This crosses over into matters of food standards, livestock hygiene, etc. These matters are the subject of negotiation between the UK Government and the devolved administrations. The European Union (Withdrawal) Act 2018 requires progress reports on such issues to be published every three months.¹⁷ The most recent report was published on 20 May 2020.¹⁸ In our report on *Inter-governmental relations in the UK* we emphasised the need for transparency to ensure effective parliamentary oversight of devolution.¹⁹ Transparency to enable such oversight by both Westminster and the devolved legislatures is also important where non-legislative solutions are being proposed for common frameworks. **We recommend that the Government updates the House on how, in the negotiations with the devolved administrations towards agreeing common frameworks, the issue of overlapping competences within the Agriculture Bill is being managed.**

Consent to the use of delegated powers

19. Clause 41(3)(b) allows the Secretary of State by regulations under clause 40 to make provision setting “a limit for each of England, Wales, Scotland and Northern Ireland on the amount of domestic support of the relevant kind that may be given in that country.”
20. We have considered previously delegated powers in devolved areas that do not require the Secretary of State to consult or seek the consent of a devolved administration before their use. We concluded:

“While the legislative consent convention—that the UK Parliament will not normally legislate in areas of devolved competence without consent—does not apply to delegated legislation, we believe formal engagement with the devolved institutions on the use of such powers should be a requirement.

We recommend that powers for UK ministers to make delegated legislation in devolved areas, including the power to supersede law made by devolved legislatures, should include a requirement either to consult devolved ministers or to seek their consent, depending on the significance of the power in question. The more significant the power, the greater the need for consent to be sought.”²⁰

21. The Government has included such requirements in the Fisheries Bill currently before Parliament. Regulations relating to the licensing of British or foreign fishing boats require the consent of ministers from the devolved

17 European Union (Withdrawal) Act 2018, [schedule 3, para 4](#)

18 Cabinet Office, *The European Union (Withdrawal) Act and Common Frameworks: 26 December 2019 to 25 March 2020*, 20 May 2020: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886372/TheEuropeanUnion-Withdrawal-ActAndCommonFrameworks.pdf [accessed 15 June 2020]

19 Constitution Committee, *Inter-governmental relations in the United Kingdom* (11th Report, Session 2014–15, HL Paper 146), paras 184–86

20 Constitution Committee, *Brexit legislation: constitutional issues* (6th Report, Session 2019–21, HL Paper 71), paras 64–65

administrations,²¹ and powers relating to fisheries, aquacultures and aquatic animal diseases are subject to consult or consent requirements.²²

22. **We recommend that the power in clause 40 should require the Secretary of State to consult the relevant devolved administrations prior to regulations being made.**
23. Clause 42(4) provides that regulations under clause 40 “may make provision requiring a devolved authority to provide information to the Secretary of State”. This is a potentially invasive power. It is not clear why, in the context of inter-governmental relations and the conclusion of common frameworks, such a power is required. **The Government must justify the inclusion of the power in clause 42(4).**

Inter-governmental relations

24. Disputes about legislative competence, legislative consent or consultation on delegated powers, and the need to agree common frameworks all underline the need for an effective system of inter-governmental relations. We have reported on and made recommendations previously about the importance of inter-governmental relations.²³ We recognise the UK’s departure from the European Union has added to political tensions between the UK government and the devolved administrations.²⁴ This makes it all the more important that the mechanisms for discussing and resolving disagreements are effective.
25. **We reiterate the conclusion in our report on the European Union (Withdrawal) Bill:**

“Effective inter-governmental relations are essential to achieve a smooth transfer of competences from the EU level to the devolved administrations and to agree new common UK frameworks. We urge the Government and the devolved administrations as a matter of urgency to work cooperatively to improve the operation of the Joint Ministerial Committee as the primary forum for these discussions.”²⁵

Delegated powers

Skeleton legislation

26. The version of the Agriculture Bill introduced in 2017–19 was a textbook example of a skeleton bill.²⁶ It provided the Government with wide-ranging delegated powers to make new laws in respect of agriculture with no clarity as to the policy that those powers would be used to effect. The Delegated Powers and Regulatory Reform Committee (DPRRC) scrutinised that Bill and concluded:

21 Fisheries Bill [HL Bill 71 (2019–21)], [clauses 14\(4\) and 16\(4\)](#)

22 *Ibid.*, clauses 36–41

23 Constitution Committee, *Inter-governmental relations in the United Kingdom* (11th Report, Session 2014–15, HL Paper 146)

24 Constitution Committee, *Brexit legislation: constitutional issues* (6th Report, Session 2019–21, HL Paper 71), para 57

25 Constitution Committee, *European Union (Withdrawal) Bill* (9th Report, Session 2017–19, HL Paper 69), para 264

26 Constitution Committee, *The Legislative Process: The Delegation of Powers* (16th Report, Session 2017–19, HL Paper 225), paras 51–58

“We are dismayed at the Government’s approach to delegated powers in the Agriculture Bill.

(a) The Agriculture Bill represents a major transfer of powers from the EU to Ministers of the Crown, bypassing Parliament and the devolved legislatures in Wales and Northern Ireland.

(b) Parliament will not be able to debate the merits of the new agriculture regime because the Bill does not contain even an outline of the substantive law that will replace the CAP after the United Kingdom leaves the EU. Most debate will centre on delegated powers because most of the Bill is about delegated powers. At this stage it cannot even be said that the devil is in the detail, because the Bill contains so little detail ...”²⁷

27. The revised Agriculture Bill is a significant improvement. Many of its delegated powers are subject to tighter conditions, the range of criminal offences they can create is much reduced, a number of powers are subject to firmer monitoring and reporting requirements, and the affirmative resolution procedure is now required for almost all of the Henry VIII powers. The DPRRC said: “We welcome the Government’s response, which engages very constructively with our concerns. The new Bill makes some important changes reflecting those concerns ... Although the revised Bill still contains a significant transfer of power from the EU to Ministers of the Crown, there is no doubt that, from this Committee’s perspective, it is a marked improvement on the original Bill.”²⁸
28. **We echo the Delegated Powers and Regulatory Reform Committee in welcoming the changes in this version of the Agriculture Bill. It is evidence of the valuable effect that parliamentary scrutiny has on legislation and how constructive engagement by the Government can result in better law.**
29. Nonetheless, the Bill remains skeletal in parts—a feature of many Brexit-related measures²⁹—and many of the powers are still wide in their scope to implement new policy. Such powers, even when they have been circumscribed somewhat, remain an issue of constitutional concern as they involve a significant transfer of authority to the executive. Parliamentary scrutiny of the use of these delegated powers is therefore important. We reiterate the conclusion in our recent report on constitutional issues raised by the Brexit legislation:

“Scrutiny of delegated legislation is challenging in normal times, due to the volume of statutory instruments, their often technical content, and the number of different procedures to which they may be subject. Retained EU law issues, and the volume of new instruments and operational challenges posed by COVID-19, add to the pressures on Parliament’s scrutiny while stretching its limited advisory capacity. We recommend the House reviews its processes and resources in light of this task. As part of this

27 Delegated Powers and Regulatory Reform Committee, *Agriculture Bill* (34th Report, Session 2017–19, HL Paper 194), para 4

28 Delegated Powers and Regulatory Reform Committee, *Agriculture Bill* (13th Report, Session 2019–21, HL Paper 69), paras 3 and 21

29 Constitution Committee, *Brexit legislation: constitutional issues* (6th Report, Session 2019–21, HL Paper 71), paras 19–23

work, the Liaison Committee should commission research on the adequacy of the resources available to the House and its committees.”³⁰

Criminal offences

30. Clauses in the original bill authorised the creation of criminal offences punishable by up to two years’ imprisonment. The new version of the Bill does not contain these provisions, although provisions allowing the creation of criminal offences punishable by fines remain.³¹ Regulations relating to the marketing standards offences are subject to affirmative procedure, while those relating to organic products are subject to the affirmative procedure only on their first use; the negative procedure applies thereafter. The DPRRC considered the powers to create these offences were an “inappropriately wide delegation of power”.³²
31. **While we welcome the improvements made to the Bill, we remain concerned about the creation of criminal offences using delegated powers. We reiterate our view that the creation of criminal offences by delegated powers is in general constitutionally unacceptable.**³³

Amending retained EU law

32. We observed in our report on the European Union (Withdrawal) Bill that the Government had a justifiable requirement for “abnormally wide delegated powers” to provide legal certainty while delivering Brexit, and that these powers needed to be tightly circumscribed and subject to close scrutiny by Parliament.³⁴ Parliament ultimately approved broad powers in the European Union (Withdrawal) Act 2018 for the Government to amend retained EU law—the EU law transferred to UK law to maintain consistency in the law, at least temporarily—with additional scrutiny mechanisms to oversee the use of those powers. These powers exist “to prevent, remedy or mitigate” deficiencies in retained EU law arising from withdrawal. One of our concerns in scrutinising the bills relating to Brexit is the seeking of further powers to amend retained EU law that are not subject to safeguards similar to the those in that Act.³⁵
33. The 2017–19 Agriculture Bill contained a range of powers for ministers to amend retained EU law to “simplify or improve” the legislative scheme.³⁶ This was a subjective test for wide delegated powers to deliver new agriculture

30 *Ibid.*, para 72

31 Clauses 35(3)(f) and 36(9)(f). Comparable powers are conferred on the Welsh Ministers and the Northern Ireland Department of Agriculture, Environment and Rural Affairs by schedules 5 and 6 respectively.

32 Delegated Powers and Regulatory Reform Committee, *Agriculture Bill* (13th Report, Session 2019–21, HL Paper 69), para 19

33 Constitution Committee, *Brexit legislation: constitutional issues* (6th Report, Session 2019–21, HL Paper 71), para 30. See, also, Constitution Committee, *The Legislative Process: The Delegation of Powers* (16th Report, Session 2017–19, HL Paper 225), para 50

34 Constitution Committee, *European Union (Withdrawal) Bill* (9th Report, Session 2017–19, HL Paper 69), summary

35 Constitution Committee, *Brexit legislation: constitutional issues* (6th Report, Session 2019–21, HL Paper 71), paras 42–46 and 67–72

36 See, for example, Agriculture Bill [HC Bill 266 (2017–19)], [clause 6](#)

policy. The powers in the current Bill are more specific in the purposes for which they may be used. For example, the power in clause 9 may be used for:

- “(a) simplifying the administration of the scheme or otherwise making its operation more efficient or effective;
 - (b) removing provisions which are spent or of no practical utility;
 - (c) removing or reducing burdens, or the overall burdens, on persons applying for, or entitled to, direct payments under the scheme or otherwise improving the way that the scheme operates in relation to them;
 - (d) securing that any sanction or penalty imposed under the scheme is appropriate and proportionate;
 - (e) limiting the application of the scheme to land in England only.”
34. While this is an improvement, clause 9 permits regulations that will make the operation of the scheme in question “more efficient or effective”. While not equivalent to “modify and simplify”, this is still a potentially wide test and one open to liberal interpretation.
35. These powers to amend retained EU law, subject only to the negative resolution procedure unless they amend primary legislation, are significant. Given that much agriculture policy was determined at EU level, and implemented by way of delegated legislation, the retained EU law these powers will be capable of amending may have important policy implications.
36. **While we welcome the improvements in the tests in clause 9 and elsewhere in the Bill for using delegated powers to amend retained EU law, we remain concerned about the subjective nature of some of the criteria. It is regrettable that these powers are not constrained by the narrower tests and enhanced scrutiny mechanisms in the European Union (Withdrawal) Act 2018. Parliament will have to be vigilant in scrutinising their use.**

APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

Members

Lord Beith
 Baroness Corston
 Baroness Drake
 Lord Dunlop
 Lord Faulks
 Baroness Fookes
 Lord Hennessy of Nympsfield
 Lord Howarth of Newport
 Lord Howell of Guildford
 Lord Pannick
 Lord Sherbourne of Didsbury
 Baroness Taylor of Bolton (Chair)
 Lord Wallace of Tankerness

Declarations of interest

Lord Beith
Honorary Bencher of the Middle Temple
 Baroness Corston
No relevant interests
 Baroness Drake
No relevant interests
 Lord Dunlop
No relevant interests
 Lord Faulks
No relevant interests
 Baroness Fookes
No relevant interests
 Lord Hennessy of Nympsfield
No relevant interests
 Lord Howarth of Newport
No relevant interests
 Lord Howell of Guildford
No relevant interests
 Lord Pannick
No relevant interests
 Lord Sherbourne of Didsbury
No relevant interests
 Baroness Taylor of Bolton (Chair)
No relevant interests
 Lord Wallace of Tankerness
No relevant interests

A full list of members' interests can be found in the Register of Lords' Interests:

<http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/>

Professor Jeff King, University College London, and Professor Stephen Tierney, University of Edinburgh, acted as legal advisers to the Committee. They both declared no relevant interests.